U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: October 8, 1998
Case No. 98 INA 123

In the Matter of:

NEUROGEN CORPORATION, *Employer,*

on behalf of

CHIH KUN CHAI, *Alien.*

Appearance: D. E. Marcus, Esq., of West Hartford, Connecticut, for Employer and Alien.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ma CHIH KUN CHAI ("Alien") by NEUROGEN CORP., ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor ("DOL") at Boston, Massachusetts, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.

STATEMENT OF THE CASE

On July 1, 1996, the Employer applied for alien labor certification for the permanent full time employment of the Alien as a "Research Associate II" with the following duties:

> Develops and validates bioanalytical methods for the analysis of pharmaceutical compounds developed at Neurogen, assays samples from toxicology and pharmacokinetic studies, sets up in vivo and in vitro experiments for biotransformation studies of pharmaceutical compounds developed at Neurogen, isolates and identifies major metabolites of pharmaceutical compounds developed at Neurogen and analyzes data and writes technical reports upon completion of each study.

AF 192, box 13. The position was classified as a "Biochemist" under DOT Occupational Code No. 041.061-026.[2] The required Education was six years of college and a Master of Science degree with the Major Field of Study in "Pharmacy, Chemistry, Biology." The Other Special Requirements were the following:

> HPLC, UV, flourescent spectrometry, calculation of pharmacokinetic parameters using statistical principles, use of solid phase extraction method for sample preparation, generation of pharmacokinetc parameters by compartmental methods using PCNONLIN, fitted plasma concentration to pharmacokinetic model using PCNONLIN,quantification of drug/plasma concentrations from toxicological studies, correlation of in vitro-in vivo dissolution profile and determination of bioavailability using denconvolution method.

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[2] 041.061-026. **BIOCHEMIST** (profess. & kin.) alternate titles: chemist, biological. Studies chemical process of living organism: Conducts research to determine action of foods, drugs, serums, hormones, and other substances on tissues and vital processes of living organisms. Isolates, analyzes, and identifies hormones, vitamins, allergens, minerals, and enzymes and determines effects on body functions. Examines chemical aspects of formation of antibodies, and conducts research into chemistry of cells and blood corpuscles. Studies chemistry of living processes, such as mechanisms of development of normal and abnormal cells, breathing and digestion, and of living energy changes, such as growth, aging, and death. May specialize in particular area or field of work and be designated Chemist, Clinical (profess. & kin.); Chemist, Enzymes, (profess. & kin.); Chemist, proteins (profess. & kin.); Chemist, Steroids (profess. & kin.). May clean, purify, refine, and otherwise prepare pharmaceutical compounds for commercial distribution and develop new drugs and medications and be designated Chemist, Pharmaceutical (profess. & kin.). *GOE: 02.02.03 STRENGTH: L GED: R6 M6 SVP: 8 DLU: 77.*

Id., box 15. The position consisted of forty hours per week from 8:30 AM to 5:00 PM, with no overtime. The salary offered was $42, 336.75, per year. *Id*., boxes 10-12. After the job was posted and advertised, seventeen U. S. workers applied for the job, but none of them was hired. AF 80A-80B.

Notice of Findings. On June 2, 1997, the CO's Notice of Findings ("NOF") denied the application, subject to the Employer's rebuttal. Citing 20 CFR §§ 656.21(b)(2) and 656.21(b)(5) the CO said the Employer's special requirements were restrictive.[3] The CO explained that the Employer's application had stated special requirements that violated the regulations in that they were "subjective, not measurable in nature, and unobtainable." Repeating the above-quoted special requirements, the CO explained,

> It appears that the special requirements are tailored to meet the alien's qualifications and background. Furthermore, the employer is not requiring any work experience, yet, requiring experience in the special requirements category. It appears that this job description is very contradictory and [misleading] to U. S. applicants. No experience is required but one must have the experience listed as the special requirements in order to perform the job duties. How does one obtain these requirements without any work experience? These requirements appear to be very subjective and not measurable, since it's not clear how one can obtain these subjective skills without work experience.

AF 78. (1) The CO directed the Employer to establish how a job candidate could attain all of the special requirements without work experience and how such subjective requirements could be measured. (2) The CO directed the Employer to demonstrate how all of the itemized Special Requirements related to the Job Duties and explain why a worker could not perform the job duties without the skills stated in the Special Requirements, as above. (3) The CO directed the Employer to show that it had only hired workers as Research Associate II who had the type of background and skills specified in the Special Requirements. (4) The CO directed the Employer to provide the names of the individuals it had hired as Research Associate II in the previous three years, together with copies of their job descriptions and their qualifications before they were hired.[4]

Rebuttal. The Employer's July 3, 197, rebuttal addressed the issues noted in the NOF. AF 07-76. The rebuttal, which was summarized in a letter by Employer's counsel, consisted of statements by an officer of the Employer, who supported its allegation that the Alien acquired the skills necessary to meet the Special Requirements during her studies for the Master of

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[3] The regulations provide at 20 CFR §§ 656.21(b)(2) and 656.21(b)(6) that an employer must establish that the position offered has been and is being described without unduly restrictive job requirements. The employer must further prove that its requirements for the position, as described, represent its actual minimum requirements for the job, and that the employer has not hired workers with less training or experience for jobs similar to that involved in the position or that it is not feasible to hire workers with less training or experience than its job offer requires.

[4] As the job requirements were in question, the CO further found that it was impossible to determine whether the qualifications of the U. S. job applicants met the criteria for this position at that time.

Science degree. AF 10-11. The Employer then admitted that during the three years preceding the hiring of the Alien it had not employed another Research Associate II with the type of background and skills that it now required for the specific job that it was offering the Alien. AF 11-12. The Employer said,

> In the past 3 years Neurogen Corporation has not hired another Research Associate II with this type of background and skills. The title of Research Associate II is a generic title within Neurogen Corporation. Each position within Neurogen Corporation for a Research Associate II carries with it its own unique experience and educational requirements. The title of Research Associate II at Neurogen Corporation is more of a categorization for salary purposes than for any other reason. The Department which [the Alien] works in, i.e. drug metabolism, is a relatively young department, established about 2 years ago, and so far we have hired only 2 research Associates II, [the Alien] and Mr. Alan Wei in this department. Mr. Alan Wei's job description (attached) dose not require skill in PCNONLIN or deconvolution method but requires GLP method validation, and animal handling skills, among other things. Therefore his background and skills are partially different than that indicated in this application. ...

AF 12. (Copied verbatim without change or correction, except as bracketed.)[5]

Final Determination. On October 6, 1997, the CO summarized the NOF and the Employer's rebuttal in the Final Determination, and concluded that Employer's rebuttal failed to correct the defect it discussed. The CO then said,

> The alien gained proficiency with these requirements doing work toward her thesis. It is reasonable to assume that thesis work toward a degree is highly specialized, and perhaps unique, and thereby quite restrictive in nature. It is unreasonable to require U. S. applicants to have familiarity with subjects that the alien has focused on during thesis work, as not all students research similar work, thereby all students do not gain the same specific experience. It is unfair to judge the qualifications of many individuals against the specific merits of one individual's course work preferences. Furthermore since the employer is not requiring any work experience, it is logical to conclude that they are depending solely on an applicant's educational qualifications, such as thesis work, which has already been shown to be restrictive in nature due to the high degree of specialization required for such research.

Af 05-06. The CO also noted (1) Employer's admission that it had not previously hired another Research Associate II with the same background and skills that it made Special Requirements in this application, and (2) its further statement that the Alien and Mr. Wei were the only workers it had hired as Research Associate II in that department. Addressing this evidence and the "research protocol packets" submitted to document Employer's argument that such restrictive requirements were necessary to perform the job duties, the CO found that this documentation

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[5] This statement was supported by the description of Mr. Wei's job and a description his qualifications before he was hired for that position. AF 13.

further substantiated the inference that the Special Requirements were "tailored to meet the alien's qualifications and background." The CO then said,

> The mere fact that this is a new position, created two years ago when the alien was brought on board would seem to indicate that the requirements may have been tailored around the alien. This idea is further evidenced by the submission of Alan Wei's qualifications. The Employer has noted that Alan Wei is the only other Research Associate II that has been hired in the past three years[. H]owever, the special requirements required for this position are quite different. Moreover, the three research protocols submitted by the employer serve only to show [that] these research protocols are part of the position's duties, not that they are requirements essential to perform in the position of Research Associate II.

AF 06. In denying certification, the CO concluded that the Employer failed to prove that its restrictive requirements were essential to the performance of the job's duties, or that a U. S. workers with lesser qualifications could not perform the job duties in an acceptable manner.

Appeal. On November 26, 1997, the Employer appealed, claiming error in the CO's findings of fact and law.

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, it must comply with the Act and regulations when the employer seeks to apply such hiring criteria to U. S. job seekers when it is testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, an employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2) that

> The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements: (i)The job opportunity's requirements, unless adequately documented as arising from business necessity: (A) Shall be those normally required for the job in the United States; (B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs; ...

Burden of proof. The Panel is aware of the policy expressed in § 212(a)(14)[6] of the Immigration and Nationality Act of 1952, which was enacted to exclude aliens competing for jobs U. S. workers would fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." **Cheung v. District Director, INS**, 641 F2d 666, 669 (9th Cir., 1981); **Wang v. INS**, 602 F2d 211, 213 (9th Cir., 1979). To achieve this Congressional purpose the Department of Labor ("DOL") adopted regulations setting forth a number of

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[6] This section was amended by § 212(a)(5)(A) of the Immigration and Nationality Act of 1990 and was recodified as 8 U.S.C. § 1182(a) (5)(A).

provisions designed to ensure that the statutory preference favoring domestic workers is carried out whenever possible.[7] In addition the DOL incorporated into 20 CFR § 656.2(b) the text of § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, which provides that, "Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act. ..."

The CO's Findings. By the Final Determination the CO limited the reasons for denying certification to the NOF directions that the Employer (1) establish how a job candidate could attain all of the special requirements without work experience and how a worker's possession of such skills could be measured , and (2) prove that the Employer had only hired workers as Research Associate II who had the type of background and skills specified in its Special Requirements.[8] The Employer clearly admitted, however, that the only occasion when it hired a worker with the skills it stated as Special Requirements was its employment of the Alien for the position at issue. The Employer further admitted that the only way of acquiring the specific skills described in the Special Requirements was to pursue a course of studies in Pharmacy, Chemistry, or Biology that was identical to the curriculum the Alien completed in graduate work leading to the degree of Master of Science.

Analysis and Summary. It is well-established that an employer has the burden of proving that a *bona fide* job opportunity exists that is clearly open to U. S. workers. **Amger Corp.**, 87 INA 545 (Oct. 15, 1987) (*en banc*), as cited in **State of California Dept. of Consumer Affairs**, 94 INA 396 (Jul. 18, 1995); **Atherton Development & Engineering Corp.**, 92 INA 422 (May 11, 1994). The Board has held that for a job to be "clearly open to any qualified U. S. worker" under 20 CFR § 656.20(c)(8), the employer must establish the business necessity of any unduly restrictive job requirement. **Canadian National Railway Co.**, 90 INA 066 (Sep. 11, 1992)(*en banc*), *recon. den*. (Nov. 20, 1992)(*en banc*).

The Employer's admission that it historically had employed hired workers as Research Associate II with qualifications materially different from those listed in its application has been considered with the circumstance that it did not attempt to recruit U. S. workers for the position at issue until after the Alien was on the job long enough to have performed several research projects. AF 14-76. The Panel finds that the Employer failed to prove that it customarily hired workers as Research Associate II who had the type of background and skills specified in its

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[7] 20 CFR § 656.2(b) is consistent with the legislative history of the 1965 Amendments to the Act which establishes that Congress intended to place the burden of proof for obtaining labor certification on an employer that seeks an aliens's entry for permanent employment. See S. Rep. No 748, 89th Cong., 1st Sess., reprinted in 1965 U. S. Code Cong. & Ad. News 3333-3334.

[8] The CO appeared to have accepted as adequate the Employer's proof as to the way in which all of the itemized Special Requirements related to and were necessary to the performance of the Job Duties, even though the basis of this finding was not immediately evident in the protocols that the Employer offered as proof.

Special Requirements. While noting that PCNONLIN and DECONV (deconvolution) refer to computer programs that the Alien learned to use while working for her collegiate degrees, the Panel finds that the Employer failed to establish that otherwise qualified job candidates whose Major Field of Study was in Pharmacy, Chemistry, or Biology could not also be trained in the use of the PCNONLIN and DECONV computer programs.[9] As the Panel finds that the Employer failed to show its business necessity for rejecting otherwise qualified U. S. job candidates with the academic background in Pharmacy, Chemistry, or Biology without offering them training in PCNONLIN and DECONV, we conclude that the evidence in the Appellate File supported the CO's denial of alien labor certification.

Accordingly, the following order will enter.

ORDER

We hereby affirm the Certifying Officer's denial of alien labor certification.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

[9] The rest of the Special Requirements---HPLC, UV, flourescent spectrometry, calculation of pharmacokinetic parameters using statistical principles, use of solid phase extraction method for sample preparation, generation of pharmacokinetic parameters---appear to be consistent with the job qualifications of both Mr. Wei and of the U. S. job applicants in this record. AF 13.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.